



**OFFICE OF
THE ATTORNEY GENERAL
AUSTIN, TEXAS**

**PRICE DANIEL
ATTORNEY GENERAL**

Mar. 19, 1947

Hon. Clayton Bray
County Attorney
Sutton County
Sonora, Texas

Opinion No. V-89

Re: Authority of the County as agent for the State Highway Department to pay for condemnation awards for city property and a related matter.

Dear Mr. Bray:

Your request for an opinion of this Department is substantially as follows:

"When the State Highway Department has designated a route through an incorporated city of less than 5,000, having an active city government, does the County as agency for the condemnation in behalf of the Highway Department have to pay the condemnation award to the city property owners affected?

"The city had previously agreed informally to share the cost of condemnation within the city limits; now, the city pleads lack of funds for such project.

"I am familiar with the proposition that the County may, by agreement with the city, maintain a county road within the city limits but my problem is, as stated above, whether the County can be compelled to pay for the condemnation awards within the city limits on a designated State Highway Route, so routed and designated by the State Highway Department.

"Obviously, the damages under condemnation in a city would be greater where lots and homes are concerned than in the county proper where only acreage is involved.

"Also, does condemnation contemplate as compensable damage the expense of drilling a water well, moving a house, repairing incidental damage

caused to the house by moving, and extending and reconnecting plumbing, and such related items of expense? "

The Supreme Court, in *Norwood vs. Gonzales County*, 14 S. W. 1057, held that a Commissioners' Court had no authority to lay out a highway within the corporate limits of an incorporated town. It was there said that "the circumstances under which a County Commissioners' Court may assume authority over the streets of incorporated cities, and control them as public roads, were defined, for the first time by the Act of the Legislature of March 14, 1885." The Act of 1885 referred to now appears as a part of the Revised Statutes of 1925, Article 6703, which as to that subject reads:

"Said Court shall assume and have control of the streets and alleys in all cities and incorporated towns in Texas which have no de facto municipal government in the active discharge of their official duties."

The above statute, by the clearest implication, denies such authority as to incorporated cities and towns that do have a de jure or de facto government. It therefore results that the decision in *Norwood v. Gonzales County*, supra, is not only affected by Article 6703, as it may apply to this case, but that statute shows a legislative construction in conformity with the Supreme Court's decision. (*City of Breckenridge v. Stephens County*, 26 S. W. (2d) 405.) The Stephens County case was later reversed by the Supreme Court (40 S. W. (2d) 43) but in so doing, the Court did not overrule the *Norwood* case as is clearly shown from the following quotation:

"Of course, the town or city governing board primarily has paramount jurisdiction of the streets and highways thereof, and the Commissioners' Court would have no authority to improve streets or highways within municipalities in conflict with the jurisdiction of the city to improve the same."

The Stephens County case related to a street constituting a State highway and was decided after the transfer of the jurisdiction of Commissioners' Courts to the Highway Commission, as to State highways, under provisions of said Article 6673 and the above quoted excerpts certainly lend no support to the proposition that it transferred all jurisdiction of city authorities over State highways in the corporate limits of a city.

Article 6673, V.A.C.S., provides in part as follows:

"... The Commission is authorized to take over and maintain the various State highways in Texas, and the counties through which said highways shall pass shall be free from any costs, expense, or supervision of such highways . . ."

In the case of *Gabbert v. City of Brownwood*, 176 S. W. (2d) 344 (writ of error refused) a suit was initiated to recover for personal injuries as a result of alleged negligence on the part of the City of Brownwood. The case raised the question for decision as to whether, under the pleadings and the uncontroverted evidence, the City of Brownwood had jurisdiction of this particular section of the State Highway within its limits where the accident occurred, or whether the transfer of jurisdiction over State highways in a county from the County Commissioners' Court of such County to the State Highway Commission effected likewise a transfer of the jurisdiction of the cities and towns in such counties over State highways in such cities and towns to the State Highway Department. Judge Funderburk, speaking for the Court, said:

"Viewing the subject matter as jurisdiction, there is a clear implication in Article 6673 that the jurisdiction which it transferred to the State Highway Commission was the jurisdiction which Commissioners' Courts theretofore had over such parts of state highways as were within the several counties. Such implication results from the clause reading 'and the counties through which said highways pass shall be free from any cost, expense or supervision of such highways.' Why express the relief of counties from 'any cost, expense or supervision' and say nothing of the cost, expense and supervision by cities and towns, if the intended transfer was to affect both alike? Is not the conclusion inescapable that the only jurisdiction transferred was that theretofore possessed by county commissioners' courts? Under familiar principles the Legislature must be presumed to have been cognizant of the existing decisions and must have known that a transfer of only such jurisdiction as commissioners' courts had would not imply the transfer of such jurisdiction as cities and towns had. Therefore, we think, charter provisions or other statutes giving cities and towns jurisdiction over highways therein remained special provisions, while Article 6673, although special in its relation to Article 6703, was general as to such charter provisions and said other statutes. In this view the Legislature, while it could have transferred

jurisdiction of cities and towns over particular highways therein to the State Highway Department, nevertheless, neither expressed nor implied any intention to do so."

Article 6673-b of Vernon's Annotated Civil Statutes, provides as follows:

"The State Highway Commission is hereby authorized and empowered, in its discretion, to enter into contracts or agreements with the governing bodies of incorporated cities, towns, and villages, whether incorporated under the General Laws, providing for the location, relocation, construction, reconstruction, maintenance, control, supervision, and regulation of designated State highways within or through the corporate limits of such incorporated cities, towns, and villages, and determining and fixing the respective liabilities or responsibilities of the parties resulting therefrom; and such incorporated cities, towns, and villages are hereby authorized and empowered, through the governing bodies of such cities, town, and villages to enter into such contracts or agreements with the State Highway Commission."

Article 6674n, Vernon's Annotated Civil Statutes, provides as follows:

"Whenever, in the judgment of the State Highway Commission, the use or acquisition of any land for road, right of way purposes, timber, earth, stone, gravel or other material, necessary or convenient to any road to be constructed, reconstructed, maintained, widened, straightened or lengthened, or land not exceeding one hundred (100) feet in width for stream bed diversion in connection with the locating, relocating or construction of a designated State Highway by the State Highway Commission, the same may be acquired by purchase or condemnation by the County Commissioners Court. Provided that the County in which the State Highway is located may pay for same out of the County Road and Bridge Fund, or any available county funds.

"Any Commissioners Court is hereby authorized to secure by purchase or by condemnation on behalf of the State of Texas, any new or wider right of way or land not exceeding one hundred (100) feet in width for stream bed diversion in connection with

the locating, relocating or construction of a designated State Highway, or land or lands for material or borrow pits, to be used in the construction, reconstruction or maintenance of State Highways and to pay for the same out of the County Road and Bridge Fund, or out of any special road funds or any available county funds. The State Highway Commission shall be charged with the duty of furnishing to the County Commissioners Court the plats or field notes of such right of way or land and the description of such materials as may be required, after which the Commissioners Court may, and is hereby authorized to purchase or condemn the same, with title to the State of Texas, in accordance with such field notes. Provided that in the event of condemnation by the County the procedure shall be the same as that set out in Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, of 1925. Provided that if the County Commissioners Court of any County in which such right of way is, in the judgment of the State Highway Commission, necessary for the construction of a part of a designated State Highway shall fail or refuse to secure by purchase or by condemnation for or on behalf of the State of Texas, such right of way or part thereof, immediately and as speedily as possible, under said Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, of 1925, after being served with a copy of an order of the State Highway Commission identifying by field notes, the part of the Highway necessary for the construction of such designated State Highway and requesting such County Commissioners Court to secure same, then and in such event and within ten (10) days after the service of such notice, said State Highway Commission shall direct the Attorney General of Texas, to institute condemnation proceedings in the name of the State of Texas for the purpose of securing such right of way. The right of eminent domain to condemn any part of a right of way for a State designated highway, under the conditions herein set out is hereby conferred on the State Highway Commission and the jurisdiction for the exercise of such right is hereby conferred on the County Court of Travis County. Such condemnation proceedings shall be instituted by the Attorney General by filing a statement for condemnation with the County Judge of Travis County, Texas, and the venue of such proceeding shall be in Travis County, Texas, and jurisdiction and authority

to appoint three (3) disinterested freeholders of Travis County, Texas, as Commissioners is hereby conferred upon the County Judge of Travis County, Texas, and otherwise such condemnation shall be according to the provision of said Title 52, Articles 3264 to 3271, inclusive, Revised Civil Statutes of Texas, of 1925."

The opinion in *Gabbert, et al v. City of Brownwood*, supra, further states:

"The conclusion seems to us to be inescapable that the effect of Article 6673 was to confer upon the State Highway Department only the former jurisdiction of county commissioners' courts, which although in terms broad enough to include the former jurisdiction of cities and towns, did not do so, for the very same reason they were not included in the jurisdiction of county commissioners' courts which said Article transferred to the Highway Department.

"More effective than Article 6673b as indicating legislative construction of Article 6673 is Article 6674n authorizing commissioners' courts at county expense, but only as agents of the State Highway Department, to condemn lands and materials for 'construction, reconstruction, or maintenance of State Highways.' Will it be contended that this empowers county commissioners' courts to condemn lands and materials in the city limits of an incorporated city or town for state highway purposes? Why should the power be exercised at county expense rather than city or town expense?"

Article 1016 of Vernon's Annotated Civil Statutes, provides as follows:

"Any incorporated city or town containing not more than five thousand population in this State shall have the exclusive control and power over the streets, alleys, and public grounds and highways of the city, and to abate and remove encroachments or obstructions thereon; to open, alter, widen, extend, establish, regulate, grade, clean and otherwise improve said streets; to put drains or sewers therein, and prevent incumbering thereof in any manner, and to protect same from encroachment or injury; and to regulate and alter the grade

of premises; to require the filling up and raising of same; and such city council shall also have power to alter or vacate the alley in any block of ground in the city upon written application of the owner of the block, or if there be more than one owner of such block, then upon the written application of all owners thereof uniting in such application; such alley so vacated shall thereupon revert to and become the property of the owner of the block of which it was a part, or if more than one, then to the owners of the adjoining lots therein, each extending to the center of the alley so vacated."

In the case of *Adams, et al v. Rockwall County* (Comm. App.) 280 S. W. 759, it was held that the County of Rockwall did not have the power to condemn land for road purposes within the corporate limits of the town of Royse. In discussing the above quoted Article, the Court stated as follows:

"There does not appear to be an ambiguity in the language employed by the Legislature to express its intent as to what agency should exercise control over the highways within incorporated cities and towns, or as to the exclusive nature of that control."

In the case of *Benat v. Dallas County*, 266 S. W. 539, the Court stated:

"Except in cases coming within the scope of some general or special statute in which authority is explicitly conferred, counties are without authority to lay out or control streets and highways of the incorporated cities and towns, or to have property condemned for such purposes."

The Court was of the opinion that the Commissioners' Court of Dallas County had no power to take land by eminent domain proceedings within an incorporated city and their filing of a petition to condemn land did not confer jurisdiction. If they have no power to condemn land within the cities, clearly, they could not be compelled to pay for such condemnation awards as agents of the State Highway Department. Therefore, it is the opinion of this Department that a county as agent for the State Highway Department may not be compelled to pay the condemnation award to a city property owner whose property has been condemned for State highway purposes.

In view of the foregoing answer, a discussion of your question of compensable damages relating to the drilling of a water well, moving a house and repairing incidental damage is not deemed necessary.

SUMMARY

Inasmuch as a county may not condemn land within an incorporated city or town, by the same token, a county may not be compelled, as agent for the State Highway Department, to pay the condemnation award to city property owners whose land is condemned. (Articles 6673 and 6703, R.C. S. 1925; Gabbert, et al v. City of Brownwood, 176 S. W. (2d) 344; City of Breckenridge v. Stephens County, 26 S. W. (2d) 405; and Benat v. Dallas County, 266 S. W. 539.)

Yours very truly,

ATTORNEY GENERAL OF TEXAS

By



Burnell Waldrep
Assistant

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APPROVED MAR 20 1947



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